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IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
ASSIGNED ON BRIEFS SEPTEMBER 20, 2007

RUSSELL IRVIN FOSTER v. VALERIE NASHELLE FOSTER

**Direct Appeal from the Circuit Court for Davidson County
No. 05D-2387 Carol Soloman, Judge**

No. M2006-01277-COA-R3-CV - Filed December 20, 2007

In the midst of a divorce proceeding, the trial court found the husband in criminal contempt of court. The trial court ordered that the husband pay *pendente lite* spousal support to the wife in the amount of \$115.35 per week. The husband was to mail these payments, postmarked on Friday of each week. The wife filed a “criminal and/or civil” contempt petition, alleging that the husband failed to make 30 payments. A criminal contempt hearing was held, and the court found that the husband had failed to pay the wife her spousal support on 29 occasions. The court entered an order awarding Wife an arrearage judgment in the amount of \$3,260.50 and sentenced the husband to 180 days in jail. The husband appeals, arguing that the court should have dismissed the contempt petition because it failed to specify whether it was a civil or criminal contempt charge. In the alternative, the husband argues that the wife failed to prove beyond a reasonable doubt that he willfully failed to comply with the support order. We affirm.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Affirmed

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

Yvette Y. Cain, Nashville, TN, for Appellant

Jean N. Crowe, Nashville, TN, for Appellee

OPINION

I. FACTS & PROCEDURAL HISTORY

Valerie N. Foster (“Wife” or “Appellee”) filed a petition for an order of protection against her husband, Russell Irvin Foster (“Husband” or “Appellant”) on June 1, 2005.¹ Husband thereafter filed a complaint for divorce from Wife in circuit court in Davidson County on June 30, 2005. Wife filed a counter-claim for divorce, alleging cruel treatment and abandonment by Husband.

In an order entered on August 12, 2005, the court awarded Wife *pendente lite* spousal support in the amount of \$115.35 a week. Husband was to mail Wife this support postmarked on each Friday. Wife filed a petition for contempt on March 24, 2006, which alleged that Husband failed to pay her *pendente lite* spousal support as ordered by the court. Wife claimed that Husband’s payments were in arrearage of \$3,360.50.² The petition indicated that Wife sought to hold Husband in “criminal and/or civil contempt of court.” Wife requested that the court sentence Husband to ten days in jail for each failure/refusal to pay spousal support. Wife also filed a “notice of constitutional rights,” which stated that Wife was alleging that Husband, pursuant to Tenn. Code Ann. § 29-9-104, was in contempt of the court’s order of support, “which could result in your incarceration in the Davidson County Jail, until such time as you purge yourself of any contempt.” This notice went on to describe Husband’s right to counsel during the proceedings, his right to plead guilty or not guilty, his right to a jury trial, and his right to refrain from self-incrimination. In Husband’s answer to Wife’s contempt petition, Husband raised the affirmative defense of his present inability to pay Wife’s spousal support. Husband also asserted that Wife “must elect either to proceed on civil or criminal contempt prior to trial to allow him to prepare,” and because of her failure to do so, Husband contended that he was unable to prepare his defense.

At the contempt hearing held on May 17, 2006, both Husband and Wife testified. We do not have a transcript of the hearing.³ According to the order correcting the record, the court commenced the hearing “by clarifying that this was a Criminal Contempt Proceeding, providing a full explanation of the Appellant’s rights as a defendant in a criminal action and asking if the Appellant understood the significance of waiving his rights under the criminal code, which the Appellant said he did and he proceeded to waive his rights.” Husband also indicated that he understood his Fifth Amendment right against self-incrimination, and chose to waive that right. Wife testified that Husband was to

¹ We begin by pointing out that the record in this case is sparse. It is unclear what the grounds of the order of protection were, or when the court granted this particular order.

² Wife alleged that Husband failed to make payments on 30 specific dates spanning from August 19, 2005 to March 10, 2006.

³ Pursuant to Rule 24(c) of the Tennessee Rules of Appellate Procedure, Husband filed a statement of evidence. The trial court entered an order on March 26, 2007, which corrected Appellant’s filed statement of evidence. Although the order does not specify, we find that the court properly entered the order of correction pursuant to Rule 24(e) of the Tennessee Rules of Appellate Procedure.

pay her \$115.35 per week via U.S. mail, postmarked each Friday. Husband made only one payment in August in the amount of \$100.00, resulting in an arrearage of \$3,360.50. Wife testified that Husband made this payment via direct deposit into her bank account, but that she did not receive any more direct deposits from Husband. Wife did not receive any payments through the mail as specified in the court order.

Husband testified that he paid Wife her spousal support directly into her checking account. Husband's checking account statements, admitted into evidence,⁴ showed the following transfers from Husband's checking account into another checking account with the account number ending in "091-7:"

September 20, 2005:	\$195.00
September 26, 2005:	\$110.00 and \$100.00
September 29, 2005:	\$195.00
October 6, 2005:	\$75.00
December 9, 2005:	\$40.00
December 16, 2005:	\$40.00
January 19, 2006:	\$25.00

Judge Soloman asked Wife to write down her checking account number; she did so, and the judge ruled that her account number did not end in "091-7." Husband also testified that he did not mail payments, but he nevertheless disputed the claim that he willfully failed to comply with the court order. Husband testified that he did not mail Wife any payments because the general sessions judge previously granted Wife's order of protection that forbade him from having any communication with Wife, and he believed that included sending her mail.⁵

As to Husband's income, he testified that he had been convicted of a felony in Kentucky in 1999, and "that a result of his incarceration and inability to secure employment," he was financially unable to pay \$115.35 a week. Husband also testified that he spent his 2005 income tax refund of \$2,500 to paint his motorcycle.

In the order dated June 2, 2006, the court found that Husband failed to pay Wife her *pendente lite* spousal support on 29 separate occasions, and that as of March 10, 2006, Husband owed Wife \$3,260.50. Thus, the court awarded Wife an arrearage judgment of \$3,260.50 and sentenced Husband to 180 days in jail.

⁴ Husband's checking account statements are not included in the record before us.

⁵ On cross examination, Wife testified that she took out a warrant against Husband in general sessions court for his personally leaving an envelope in her mailbox on August 24, 2005, which was a violation of the order of protection. This envelope had no stamp or postmark and contained a check for spousal support and a letter from her son's doctor. Husband was found guilty of violating the order of protection, and ultimately found guilty of a total of six different violations of the order of protection. It is unclear what these other violations consisted of.

II. ISSUES PRESENTED

Appellant filed a timely appeal and presents the following issues, which we reorder and reword:

1. Whether the trial court erred in failing to dismiss Wife's petition for contempt because she failed to specify whether she sought to hold Husband in civil or criminal contempt.
2. Whether Wife failed to prove beyond a reasonable doubt that Husband had the ability to pay, yet willfully failed to comply with the spousal support order.

For the following reasons, we affirm.

III. STANDARD OF REVIEW

On appeal, we presume that the trial court's factual findings are correct, and we will not overturn those factual findings unless the evidence preponderates against them. Tenn. R. App. P. 13(d) (2006); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). The evidence preponderates against a trial court's finding of fact when it must support another finding of fact with greater convincing effect. *Watson v. Watson*, 196 S.W.3d 695, 701 (Tenn. Ct. App. 2005) (citing *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *The Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999)). We review the trial court's conclusions of law *de novo* upon the record with no presumption of correctness. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993) (citing *Estate of Adkins v. White Consol. Indus., Inc.*, 788 S.W.2d 815, 817 (Tenn. Ct. App. 1989)). If the trial court made no specific findings of fact, then we must look to the record to "determine where the preponderance of the evidence lies." *Kendrick v. Shoemaker*, 90 S.W.3d 566, 570 (Tenn. 2002) (citation omitted).

IV. DISCUSSION

A. Contempt petition and proceeding

On appeal, Husband contends that Wife's petition for contempt was fundamentally flawed because it sought to hold him in criminal contempt, civil contempt, or both. We disagree.

First, we must determine whether the contempt proceeding was civil or criminal in nature. See *State of Tennessee v. Turner*, 914 S.W.2d 951, 955 (Tenn. Crim. App. 1996). A court imposes civil contempt against one party for the benefit of the other party litigant. "[T]he one in contempt has the 'keys to the jail' and can purge the contempt by complying with the court's order. *Ahern v. Ahern*, 15 S.W.3d 73, 79 (Tenn. 2000) (citations omitted). On the other hand, the punishment imposed for criminal contempt is "punitive in character, and the proceeding is to vindicate the authority of the law, and the court as an organ of society." *Turner*, 914 S.W.2d at 955. Criminal contempt is further classified as either direct or indirect: direct contempt is an act committed in the

court's presence, and indirect contempt is an act committed outside the court's presence. *Id.* (citations omitted). The court may summarily punish an individual for direct contempt, but as for indirect contempt, the Tennessee Rules of Criminal Procedure provide as follows:

A criminal contempt shall be prosecuted on notice, except as provided in subdivision (a) of this rule.

(1) Content of Notice. The criminal contempt notice shall:

(A) state the time and place of the hearing;

(B) allow the defendant a reasonable time to prepare a defense; and

(C) state the essential facts constituting the criminal contempt charged and describe it as such.

(2) Form of Notice. The judge shall give the notice orally in open court in the presence of the defendant or, on application of the district attorney general or of an attorney appointed by the court for that purpose, by a show cause or arrest order.

...

Tenn. R. Crim. P. 42(b).

Looking to the present case, we are dealing with criminal contempt. In the order sentencing Husband to 180 days, Husband cannot be freed by his eventual compliance, and thus he does not have the "keys to the jail." The court found Husband in contempt as punishment for his failure to comply with a court order.⁶ See *Ahern v. Ahern*, 15 S.W.3d 73, 79 (Tenn. 2000).

We next turn to Husband's argument that the court erred by holding a civil and criminal contempt proceeding simultaneously. Husband cites to *McPherson v. McPherson*, No. M2003-02677-COA-R3-CV, 2005 WL 3479630 (Tenn. Ct. App. Dec. 19, 2005), as support for his contention that the contempt proceeding in this case was fatally flawed. This case, however, is distinguishable from the facts in *McPherson*. In *McPherson*, the trial court found the defendant liable for "civil contempt," but the Middle Section of this Court found that "the punishment imposed reflects that it was, in large part, a criminal contempt proceeding." *Id.* at *4. The court also looked to the contempt petition, which did not specify if the petitioner sought to hold the defendant in civil contempt, criminal contempt, or both. *Id.* at *5. The trial court did not provide the defendant with

⁶ Tenn. Code Ann. § 29-9-103 provides as follows:

(a) The punishment for contempt may be by fine or by imprisonment, or both.

(b) Where not otherwise specially provided, the circuit, chancery, and appellate courts are limited to a fine of fifty dollars (\$50.00), and imprisonment not exceeding ten (10) days, and, except as provided in § 29-9-108, all other courts are limited to a fine of ten dollars (\$10.00).

notice as required by Rule 42(b) of the Tennessee Rules of Criminal Procedure, nor did the court inform the defendant of his Fifth Amendment right against self-incrimination. *Id.* Thus, the Court vacated that portion of the judgment that sentenced the defendant to 10 days in jail.

The present case is distinguishable from the *McPherson* case, although we do point out that we are at a disadvantage due to a lack of a transcript. Wife's petition does state that it was for "criminal and/or civil contempt," and Wife filed a "notice of constitutional rights," which stated that Wife sought to hold Husband in contempt under Tenn. Code Ann. § 29-9-104, which provides that "[i]f the contempt consists in an omission to perform an act which it is yet in the power of the person to perform, the person may be imprisoned until such person performs it." However, the order correcting the trial court record, which the court filed in response to Husband's statement of the evidence, specifically says that "[t]he Court began the hearing by clarifying that this was a Criminal Contempt Proceeding, providing a full explanation of the Appellant's rights as a defendant in a criminal action and asking if the Appellant understood the significance of waiving his rights under the criminal code, which the Appellant said he did and he proceeded to waive his rights." Therefore, the court did not hold both a criminal and civil contempt proceeding simultaneously, as the proceeding was solely criminal.

This case is more in line with *Freeman v. Freeman*, 147 S.W.3d 234 (Tenn. Ct. App. 2003). In *Freeman*, the wife filed a petition of "civil and/or criminal contempt." *Id.* at 237. The court found the husband in civil contempt of court and sentenced him to jail. *Id.* at 236. This Court rejected the husband's argument on appeal that the trial court erred in finding him in contempt because the wife's petition sought to charge him simultaneously with both civil and criminal contempt. *Id.* at 244. We pointed out that from the record, it was clear that "the trial court did not attempt to try adjudicating both contempts simultaneously but confined her attention to civil contempt only." *Id.* We went on to find that the "mere allegation in [] the petition seeking both civil and criminal contempt does not prejudice the judicial process and allows the petitioner to elect to proceed on one or the other, providing of course, that the proper notice is afforded to the respondent." *Id.* Turning back to the present case, we point out that Husband had notice of the nature of the contempt charge at the commencement of the proceeding, was represented by counsel, and chose to proceed and testify. In conclusion, Husband's argument that the contempt petition was fatally flawed lacks merit.

B. Sufficiency of the Proof

Husband argues that the lower court erred in finding him in contempt of court and sentencing him to 180 days in jail because Wife failed to prove beyond a reasonable doubt that he had the ability to pay, and that he willfully failed to pay spousal support. We disagree.

A charge of criminal contempt involves (1) a court order, (2) the defendant's violation of that order, and (3) proof that the defendant willfully violated that order. *Huffnagle v. Huffnagle*, No. M2003-02651-COA-R3-CV, 2005 WL 2989603, at *2 (Tenn. Ct. App. Nov. 7, 2005). When dealing with the failure to pay spousal support, the court must first determine that the individual had

the ability to pay the support when it was due, and that such failure to pay was willful. *Id.* (citing *Ahern v. Ahern*, 15 S.W.3d 73, 79 (Tenn. 2000)). “Willfulness” must be proven beyond a reasonable doubt, meaning that the defendant intentionally or deliberately disobeyed the support order. *Id.* (citation omitted).

When the appellant in a criminal contempt case raises the insufficiency of the evidence, we must determine whether the record supports the finding of guilt beyond a reasonable doubt. *Levenhagen v. Levenhagen*, No. M1998-00967-COA-R3-CV, 2000 WL 1292446, at *7 (Tenn. Ct. App. Sept. 14, 2000) (citing Tenn. R. App. P. 13(e)). We will not reweigh the proof, and it is the appellant’s burden to show why the evidence is insufficient to support the contempt charge. *Id.* The appellant is presumed guilty on appeal, and “[w]e will not disturb a verdict of guilt for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt.” *Id.* (citations omitted).

Turning back to the present case, we begin with a review of the final order, which mentions neither Husband’s ability to pay nor the fact that he willfully failed to pay. Rather, the order states the conclusion that “Husband is in contempt of the Order of this Court. He has failed to pay spousal support as ordered on at least twenty-nine (29) occasions” As to Husband’s ability to pay, he testified that “as a result of his incarceration⁷ and inability to secure employment that he did not have the present ability to pay the court ordered amount of \$115.35 per week.” Husband did spend, however, \$2,500 to paint his motorcycle.

Eight exhibits are included in the record before us, but Husband’s checking account statements, labeled “Trial Exhibit #1 ” when discussed in the statement of the evidence, are not included. Pursuant to Rule 24(e) of the Tennessee Rules of Appellate Procedure, it is the appellant’s duty to ensure that the statement of the evidence conveys a “fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal.” The amount in Husband’s account would shed light on whether he had the ability to pay Wife during the relevant time frame, as the statement of the evidence indicates that Husband was financially able to make other payments to an unidentified checking account ending in “091-7.” “When the evidence heard by the trial court is not preserved by a certified transcript or statement of the evidence in accordance with the Rules of Appellate Procedure, it is presumed that there was evidence to support the ruling of the trial court.” *Williams v. Williams*, No. 01A01-9710-CV-00566, 1999 WL 93587, at *3 (Tenn. Ct. App. Feb. 25, 1999) (citations omitted). “Ordinarily, the appellant’s failure to provide an adequate record on appeal would require this Court to assume the record supported the trial court’s decision.” *Young v. Young*, No. M2003-02562-COA-R3-CV, 2005 WL 735034, at *3 (Tenn. Ct. App. Mar. 29, 2005) (citations omitted). Although Husband summarizes the transactions from Husband’s checking

⁷ It is unclear if this incarceration that Husband testified to was for the violations of the protective orders or for some other offense. According to the order correcting the record, Husband admitted at the hearing that he had been convicted of a felony in Kentucky in 1999. From the statement of the evidence, it appears that Husband was sentenced for six different violations of the protective orders, with the first sentence beginning on October 12, 2005.

account into the account ending in “091-7,” there is no way for us to determine the amounts available in Husband’s account. Thus, we presume that Husband had the ability to pay his support obligation.⁸

This does not end our inquiry, though, as ability to pay is distinct from the willful failure to pay. As previously noted, the final order does not state that Husband willfully failed to pay Wife. But again, we run into the same problem of the insufficient record. Husband does not appeal the finding that he failed to pay Wife on 29 separate occasions, but argues that the record lacks proof beyond a reasonable doubt that he intentionally or deliberately failed to pay. We disagree. It is beyond dispute that Husband willfully failed to pay Wife \$2,500, as he used this to paint his motorcycle. From the record it is clear that Husband was aware that he was to mail Wife her spousal support each week. Husband testified that he did not mail the payments because “the General Sessions Judge of the [sic] advised him in General Sessions Court of Davidson County, Tennessee that he should have no communication with the Appellee[,] and no communication meant no e-mail, no voice messages[,] and no mail.” Even assuming *arguendo* that Husband believed that the only way to avoid violating the protective order would be to make these payments via direct deposit, the court found that Husband had only made one deposit into Wife’s account, and did not hold Husband in contempt for this deposit. In sum, we find that Husband has not met his burden to overcome the presumption of guilt on appeal, and we affirm.

V. CONCLUSION

For the aforementioned reasons, we affirm the decision of the trial court. Costs of this appeal are taxed to Appellant, Russell Irvin Foster.

ALAN E. HIGHERS, P.J., W.S.

⁸ Husband argues in his brief that Wife did not prove that he had the ability to pay, and that he presented evidence “as to his incarceration time during the time period payment[s] were due and bank statements which he testified shows that he had monies transfer from his checking account to [Wife’s] checking account.” We find this argument somewhat disingenuous, as the court found that these direct deposits were not made into Wife’s account, but a different account.